(2014) 03 J&K CK 0021

In the Jammu And Kashmir High Court

Case No : Others Writ Petition (OWP) No. 1153 Of 2012

ACE Engg. Co. APPELLANT

Vs

National Hydroelectric Project Corpn. Ltd. RESPONDENT

Date of Decision : 27-03-2014

Acts Referred:

Citation : (2014) 2 JKJ 427

Hon'ble Judges : Bansi Lal Bhat, J

Bench : Single Bench

Advocate : Pranav Kohli, Advocate for the Appellant; Gagan Basotra, Sr. AAG, Advocate for the Respondent

Final Decision : Dismissed

Judgement

Bansi Lal Bhat, J.—Petitioner No. 1 is a partnership firm of which petitioners 2 and 3 are partners vide Partnership Deed dated

06.01.2010. It is averred in the petition that petitioners 2 and 3 set up an Industrial Unit for manufacturing of pre-fabricated Shelters and Steel

Bridges, Steel fabrication, Steel Doors and Windows, Gates and Grills involving Civil/Mechanical works in partnership under the name and style of

M/s. ACE Engineering Company at Bari Brahmana, Jammu. The partnership firm consisted of three partners including petitioners 2 and 3. The 3rd

partner Mohinder Gupta who along with petitioners 2 and 3 was a party to the partnership deed dated 06.12.2002, retired from business and the

original partnership firm was reconstituted vide reconstruction deed dated 01.04.2008. Thereafter the original partnership firm was dissolved vide

Deed of Dissolution dated 24.11.2010. Two works, one for construction of 70 Mts. Steel Bridge, at Doda and 2nd work relating to three numbers of Railway Bridges of 48 Mtrs. span each being carried jointly by petitioners 2 and 3 continued to be carried out on some terms and

conditions even after the dissolution of partnership firm. It was stipulated in the dissolution deed that the partnership firm will enter into a joint

venture with the new firm i.e. M/s. ACE Engineering Unit-II wherein the credentials of the first firm will be used as and when required. Petitioners

2 and 3 claimed to have gained substantial work experience and turnover from the construction of Bridges and other constructions works. The

new Unit styled M/s. ACE Engineering Unit-II consisting of petitioners 2 and 3 as its partners vide partnership deed dated 06.01.2010 continued

to do the business of construction of Steel Bridges, Pre-fabricated Shelters, Hangars, Steel Towers, construction of permanent Bridges etc.

Petitioners 2 and 3 decided to enhance the business of M/s. ACE Engineering Unit-II and executed supplementary partnership deed dated

26.03.2012 for the purposes of sharing credentials in the nature of work experience and financial turnover of the original firm and its partners to be

treated as credentials of the new firm. Thus, the turnover and work experience gained by the petitioners 2 and 3 was to be construed as the

experience of the partners irrespective of constitution or dissolution of firm. The experience of the original firm was agreed to be shared in the new

firm for all subsequent tenders etc. Respondent No. 2 issued Notice Inviting Tenders (for brevity ""NIT"") dated 20.11.2011 for contract of

supplying, fabrication and launching/erection of 56 Mtrs. Span permanent suspended Steel Bridge over existing sub-structure/balanced Cantilever

end of the overall 137 Mtrs. Span Bridge across River Jehulm, near Bandi Uri for Uri-II Hydroelectric Project Rajarwani (J&K) with estimated

cost of work of Rs. 3,68,59,824. Petitioners submitted their bid in the name of petitioner No. 1 on 31.01.2012, along with requisite documents

and draft of earnest money to the tune of Rs. 7.37 lacs. Along with the petitioners' firm two other bidders also submitted their bids for participation

in the tendering process. Petitioner No. 1 was asked to establish its qualification for the subject work. Petitioner No. 1 had replied the letter and

submitted all relevant information. Petitioners who claim to have fulfilled all technical qualification as per the requirements of tender document are

aggrieved of the rejection of their technical bid on the ground that the experience and financial turnover gained by the petitioners from the original partnership firm i.e. ACE Engineering Company has not been considered while assessing the eligibility of the firm in pursuance to the NIT dated

20.10.2011. The impugned rejection has been assailed on the ground that the experience and turnover gained by the petitioners 2 and 3 jointly as

well as severally while executing the works in the original partnership firm became the credentials of the bidder firm and was thus required to be

computed/assessed/evaluated in determining the liability, that since both the partners of original partnership firm continued to be the partners of the

bidder firm, the entire work experience, and financial turnover was to be treated as credentials of the bidder firm and finally that the experience

acquired by the petitioners 2 and 3 over a period of time, irrespective of their partnership firm had to be taken into consideration as the experience

of petitioner No. 1 of which, they were partners.

2. Petitioners are further aggrieved of retendering of aforesaid works by the respondents as they are disqualified from participating in the

retendering in the ace of grounds of rejection.

3. Petitioners have sought the following reliefs:--

(i) Writ of certiorari seeking quashment of the decision whereby the Technical bid of the petitioner No. 1 has been rejected arbitrarily, illegally and

without considering the relevant material.

(ii) Writ of Mandamus directing the respondents to declare the Technical Bid of the petitioner as duly qualified and in accordance the NIT

stipulations and consequently open financial bid for the contract of supplying, fabrication and launching/erection of 56 Mtrs. Span permanent

suspended Steel Bridge over existing sub-structure/Balanced Cantilever end of the overall 137 Mtrs. Span Bridge across river Jhelum , near Bandi

Uri for Uri-II Hydroelectric Project Rajarwani (J&K) (Package No. P&C/11-12/18 in pursuance to the NIT No. NH/Uri-2/P&C/11/1546 dated

20.10.2011.

(iii) Writ of Prohibition restraining the respondents from re-tendering for the contract of supplying, fabrication and launching/erection of 56 Mtrs.

Span permanent suspended Steel Bridge over existing sub-structure/Balanced Cantilever end of the overall 137 Mtrs. Span bridge across river

Jhelum , near Bandi Uri for Uri-II Hydroelectric Project Rajarwani (J&K) (Package No. P&C/11-12/18).

(iv) Mandamus commanding the responding to consider the experience of petitioner No. 1 for evaluating the technical bid and to consider the

petitioner's as eligible and qualified and resultantly its financial bid to be considered and evaluated for allotment of the contract along with other

eligible tenderer.

4. Objections have been filed by the respondents.

5. It has been pleaded in the objections that the petitioners along with other contractors offered bids for the construction. Application form of

contractor, namely, J.S. Industries, Faridabad was rejected due to non-compliance with Clause 14.1 of Instructions to Bidders (for Brevity ""ITB"").

Two other contractors, namely, M/s. Menghi Hightech Pvt. Ltd. Jammu and M/s. A.S. Bhumber, Jallandhar did not possess the technical

experience as such were not eligible to participate in the said tendering process. Petitioners also did not possess the requisite technical experience

as such, the bid of petitioners was rejected. On filing of instant petition by the petitioners, this Court directed that the respondents may proceed

with the tendering process but shall not finalize the same. In the meantime, due to poor response and the tenderers not being qualified, tender was

cancelled on the recommendation of Tender Evaluation Committee. Fresh tender was issued, but the same too was cancelled due to non-

availability of tenderers having the requisite technical experience. Respondents again resorted to fresh tendering process on 13.06.2013. However,

petitioner did not submit any tender in pursuance of the aforesaid NIT. Petitioners sought extension of time by 10 days which was extended by the

respondents, but the petitioners did not quote any tender. Thus, petitioners did not participate in the fresh tendering process. Four bids have been

received in response to the fresh NIT but the tendering process has not been finalized due to interim directions passed by the Court. It is pleaded

that the instant writ petition has turned infructuous as the petitioner has not participated in the subsequent tendering process. It is further pleaded

that the petitioners have no case on merits as the petitioner's firm was reconstituted on 06.01.2010 and registered on 02.04.2012, which cannot be

legally construed to have the previous work experience of the erstwhile partnership firm.

6. With the consent of the learned counsel for the parties, petition was admitted

to hearing and taken up for final disposal.

7. It is argued on behalf of the petitioners that M/s. ACE Engineering Unit-II got the legacy of M/s. Ace Engineering Company with same partners

constituting the firm as the original M/s. ACE Engineering Company except 3rd partner Mohinder Gupta who retired from business of the original

partnership firm which was reconstituted in terms of reconstruction deed dated 01.04.2008, between petitioners 2 and 3. It is submitted that in

terms of supplementary partnership deed dated 26.03.2012 financial turnover of the original firm and its partners was to be treated as credentials

of one firm and the experience of the original firm could be utilized by new firm for all subsequent tenders. It is further submitted that the

respondents have arbitrarily rejected the bid submitted by the petitioners without considering that petitioners 2 and 3 were the partners of original

firm having acquired vast experience and skill in executing the works in respect whereof bids were invited at the annual turnover and technical

experience of the partners could not be excluded merely because petitioner No. 1 was formed as new partnership firm. Learned counsel for the

petitioners submitted that it was the experience gained by the partners of the firm viz petitioners 2 and 3 and not the petitioner No. 1 which had to

be considered for the purposes of evaluating the technical experience. It is further submitted that since petitioners were declared ineligible, due to

non-consideration of their vast experience, they could not have participated in the re-tendering process.

8. Per-contra learned counsel for the respondents submitted that in terms of clause 9 of NIT employer reserves the right to cancel the tendering

process at any time before award of work. It is further pointed out that in terms of clause 27 of the ITB the employer reserves the right to accept

or reject any bid and to cancel the bidding process and reject all bids at any time prior to the award of contract without thereby incurring any

liability to the affected bidder or bidders or any obligation to inform the affected bidder or bidders of the grounds for the employer's action. It is

submitted that bids were rejected, as all bidders participating in the tendering process did not possess technical experience. The decision was

taken by the Tender Evaluation Committee and the Court could not sit in appeal over administrative decision in regard to rejection of technical bid.

It is pointed out that the Tender Evaluation Committee had also cancelled the second tender in which petitioners did not participate and despite

seeking extension of time they did not participate in the fresh tendering process. It is further submitted that the petition has become infructuous as

the re-tendering has not been assailed by the petitioners.

9. On consideration of the pleadings of the parties and documents placed on record in support thereof it comes to fore that M/s. ACE Engineering

Company was constituted as an Industrial Unit for manufacturing of pre-fabricated shelters and steel bridges, steel fabrication, steel doors and

windows, gates and grills in terms of partnership deed dated 06.12.2002. It consisted of three partners, namely, Vikram Mahajan (petitioner No.

3), Puneet Resutra (petitioner No. 2) and Mohinder Gupta. This firm, according to petitioners, executed several projects including construction of

35 Mtr. PSC Box at Ranbir Canal, Jammu, 70 Mtrs. Steel Bridge, Doda and three numbers of Railway Bridges of 48 Mtrs. Span each for

IRCON International. Since Mohinder Gupta retired from business, the firm was reconstituted vide reconstruction deed dated 01.04.2008 with

petitioners 2 and 3 constituting the firm. The partnership firm had dissolved on 24.11.2010. However, petitioners 2 and 3 carried on the pending

business of construction of Bridge at Doda and three numbers of Railway Bridges even after dissolution. Petitioners 2 and 3 claim to have gained

substantial work experience achieving an annual turnover of Rs. 19.84 Crores in the financial year 2010-2011. They set up a new Industrial Unit

styled as ACE Engineering Unit-II in partnership consisting of petitioners 2 and 3 vide partnership deed dated 06.01.2010 continuing the earlier

business of construction of Steel Bridges etc. However, to enhance the business of subsequent partnership firm, they decided to enter into a

supplementary partnership deed dated 26.03.2013 for sharing the credentials in the nature of work experience and financial turnover of the original

firm and its partners. It is claimed that since the constituents of original partnership firm i.e. petitioners 2 and 3 were the partners of new firm, the

entire turnover and work experience gained by the partners of original partnership firm as also of the works completed after dissolution of original

partnership firm, was to be construed as experience of the partners.

10. Petitioners claim that they were entitled to share the experience of original

firm for all subsequent tenders. It is apt to mention that there was a

clear stipulation in the deed of dissolution dated 24.11.2010 that the original partnership firm will enter into a joint venture with a new firm wherein

credentials of the first firm will be used as and when required. Petitioners claim that respondents were bound to consider the technical experience

and financial turnover of the original partnership firm in the new firm of petitioners for the purposes of evaluation in the tendering process of

contract of 56 Mtrs. Span permanent suspended Steel Bridge across river Jhelum near Bandi Uri for Uri -II Hydroelectric Project Rajarwani in

terms of NIT dated 20.10.2011 issued by the respondents.

11. Learned counsel for the petitioners has relied upon law laid down in New Horizons Limited and Another Vs. Union of India (UOI) and

Others, , wherein it was held that non-consideration of appellants tender on the ground that experience of its constituents was not the same as that

of the appellants and acceptance of tender of respondent No. 4 who had offered a much lower royalty was arbitrary and irrational. It was further

held that in case of Joint Venture Company, experience of its constituents should be treated as its own experience and corporate veil should be

seen through for this purpose. Past experience should be considered along with present resources available to the tenderer.

12. Dealing with the aspect of judicial review the Hon'ble Apex Court further held:--

18. In the recent decision in Tara Cellular v Union of India this Court has examined the scope of judicial review in the field of exercise of

contractual powers by Government bodies and, after noticing the current mood of judicial restraint in England, the Court has laid down the

following principles.

(1) The modern trend points to judicial restraint in administrative action.

(2) The Court does not sit as a Court of appeal but merely reviews the manner in which the decision was made.

(3) The Court does not have the expertise to correct the administrative decision. If a review of the administrative decision is permitted it will be

substituting its own decision, without the necessary expertise which itself may be fallible.

(4) The terms of the invitation to tender cannot be open to judicial scrutiny

because the invitation to tender is in the realm of contract. Normally

speaking, the decision to accept the tender or award the contract is reached by process of negotiations through several tiers. More often than not,

such decisions are made qualitatively by experts.

(5) The Government must have freedom of contract. In other words, a fair play in the joints is a necessary concomitant for an administrative body

functioning in an administrative sphere or quasi-administrative sphere. However, the decision must be free from arbitrariness not affected by bias or

actuated by malafides.

(6) Quashing decisions may impose heavy administrative burden on the administration and lead to increased and unbudgeted expenditure.

13. In Ganpati RV-Talleres Alegria Track Pvt. Ltd. Vs. Union of India (UOI) and Another, , the Hon'ble Apex Court held that requirement

regarding experience cannot be construed to mean that the said experience should be of the tenderer in his name only. It is possible to visualize a

situation where a person having past experience :has entered into a partnership and the tender has been submitted in the name of the partnership

firm having no past experience. That does not mean that the earlier experience of one of the partners of the firm cannot be taken into consideration.

14. It follows that the Court is entitled to review the decision maker's evaluation of the facts in the given circumstances of a case. If the facts did

not warrant the conclusion of the decision maker, Court may intervene. A decision which is partial and unequal in its operations between different

classes has to be treated as unreasonable.

15. Whether in the instant case refusal of the Tender Evaluation Committee to consider the tender of petitioners on the ground that the condition

regarding experience, as laid down in the tendering notice was not fulfilled, can be regarded as arbitrary and unreasonable is to be ascertained from

the NIT. The qualification criteria is laid down in Clause 4 of NIT, which inter-alia, provides that to qualify for award of contract each bidder

should have successfully completed similar works during last seven years ending 31.03.2011. The employer reserved a right to cancel the

tendering process at any time before award of work. The petitioners have not been able to demonstrate that they have independently as partners of

the original firm or in joint venture of original firm with any other firm executed similar works during the last seven years ending 31.03.2011.

Petitioners have also not placed on record any document to show that the original firm M/s. ACE Engineering Company or the new firm M/s. ACE

Engineering Unit-II had entered into a joint venture with any domestic or foreign company having executed works similar to the one in respect

whereof tender was floated by the respondents. According to respondents, petitioners did not possess the requisite technical experience, as such

the bid of petitioner No. 1 was rejected. Viewed in this background, it cannot be held that the administrative decision of respondents in rejecting

technical bid offered by the petitioner No. 1 for possessing requisite technical experience was arbitrary or unreasonable. Petitioners have also not

been able to show that the evaluation made by the respondents was actuated by malafides. It further appears that petitioners did not assail the

decision of respondents in treating petitioner firm as not qualified for the aforesaid tender. They sought extension of time for submitting its bid in

response to the retendering of contract. However, they did not participate in the fresh tendering process. This clearly demonstrates that the

petitioners had accepted the rejection of their bid for not being qualified on account of not having the requisite technical experience.

Furthermore it was clearly embodied in the NIT that the employer reserves the right to cancer tendering process at any time before award of

work. Since all bids were rejected by the Tender Evaluation Committee the tendering process was cancelled and the works were retendered

which too were cancelled for lack of response. Ultimately, the works were retendered in which petitioners did not participate despite seeking

extension of time. The employer's right to cancel the tendering process in the given circumstances could not have been and has not been

questioned. In terms of Clause 27 of ITB the employer reserved the right to accept or reject any bid and to cancel the bidding process and reject

all bids at any time prior to award of contract without incurring any liability to the effected bidder or bidders. Respondents had the freedom of

contract and, in the event of rejection of technical bids of all the bidders, they were within their rights to cancel the tendering process and go for

retendering. Thus no fault can be found with the action of respondents in cancelling the tendering process. Petitioners neither having assailed the cancellation of tendering process and retendering of work nor having submitted their tender in response to the retendering despite seeking

extension, of time cannot be heard to say that the actions of respondents were actuated by malafide and the rejection of bid was unreasonable or

arbitrary.

16. There being no merit in the petition, same is accordingly, dismissed. Interim direction dated 23.08.2012 shall stand vacated.

